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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK FRANKLIN,

Defendant and Appellant.

2d Crim. No. B217873
(Super. Ct. No. BA352381-01)
(Los Angeles County)

Mark Franklin appeals a judgment of conviction entered after he pleaded nolo contendere to possession of a firearm by a felon and admitted suffering a prior serious felony conviction and serving a prior prison term. (Pen. Code, §§ 12021, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).)¹ We conclude that the trial court properly denied Franklin's motion to suppress evidence and affirm. (*Arizona v. Gant* (2009) _U.S._ [129 S.Ct. 1710, 1714, 1723-1724].)

FACTS AND PROCEDURAL HISTORY

On March 23, 2009, the prosecutor charged Franklin with possession of a firearm by a felon (count 1) and possession of a concealed firearm in a vehicle (count 2), along with sentencing allegations. Franklin filed a motion to suppress evidence

¹ All further statutory references are to the Penal Code.

pursuant to section 1538.5, and on April 27, 2009, the trial court held an evidentiary hearing.

At the hearing, Los Angeles Police Officer Gilberto Gaxiola testified that he and his partner patrolled the neighborhood of 65th Place and Van Ness Avenue during the evening of February 3, 2009. Gaxiola, a street gang enforcement officer, described the neighborhood as "most dangerous" due to the "Rolling 60's" criminal street gang. At approximately 7:30 p.m., a vehicle driven by Franklin turned the street corner without a turn signal and at an unsafe speed, nearly colliding with the marked patrol vehicle. Gaxiola decided to detain Franklin for traffic violations and pursued his vehicle a short distance before Franklin stopped.

When Gaxiola approached the driver's side of the vehicle, he saw Franklin moving his hand as though he was placing an item under the seat. He also saw Franklin remove a single black glove and place it on the passenger's seat. Based on his experience as a police officer, Gaxiola believed that Franklin was concealing drugs, a weapon, or contraband. Gaxiola testified that it is "very common" for individuals carrying weapons to wear gloves to prevent fingerprints.

Gaxiola requested Franklin's driver's license, registration, and proof of insurance. He also asked Franklin if he had a gun in the vehicle. Franklin appeared nervous, shaky, and began to perspire profusely. Gaxiola repeated his question regarding a weapon several times but Franklin did not respond.

Gaxiola became concerned for his safety and that of his partner because he believed that Franklin had concealed a gun. He repeatedly ordered Franklin to leave the vehicle, but he refused. Gaxiola telephoned his supervisor and requested additional officers. The supervisor arrived and spoke with Franklin for several minutes, demanding that he leave the vehicle. When Franklin refused, the officers forcibly removed and handcuffed him. Gaxiola intended to arrest Franklin for refusing his commands. (§ 148.)

Gaxiola searched Franklin's vehicle and discovered a loaded .38 revolver under the driver's seat and a cellular telephone. He opened the telephone to turn it off and saw a photograph of the gun on the cover. Gaxiola did not impound the vehicle. He later returned the vehicle's keys to the registered owner.

The trial court denied the motion to suppress evidence. It concluded that probable cause existed to search the vehicle for a firearm. The trial judge stated that the law did not require Gaxiola to "leave a readily mobile vehicle on the street when [he] believed that there was . . . probable cause that [a] weapon might be hidden in that vehicle."

Pursuant to a plea agreement, Franklin withdrew his plea of not guilty and pleaded nolo contendere to possession of a firearm by a felon. He also admitted suffering a prior serious felony conviction and serving a prior prison term. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).) The trial court sentenced Franklin to a four-year prison term, dismissed the remaining count and serious felony allegations upon the prosecutor's request, imposed a \$200 restitution fine and a \$200 stayed parole revocation fine, and awarded 20 days of presentence custody and conduct credits.

Franklin appeals and contends that the trial court erred by denying his motion to suppress evidence of the firearm and cellular telephone.

DISCUSSION

Franklin argues that the search of his vehicle was unconstitutional because it occurred after he had been handcuffed and because the search was unrelated to the charge of resisting a police officer. He relies on the recent Supreme Court decision in *Arizona v. Gant, supra*, _ U.S. _ [129 S.Ct. 1710, 1723] [police officers may lawfully search vehicle incident to arrest only if it is reasonable to believe that arrestee might access the vehicle or that vehicle contains evidence of the arresting offense]. Franklin asserts that constitutional commands required the officers to impound his vehicle and search it pursuant to an inventory search.

In our review of the trial court's ruling on the suppression motion, we affirm the factual findings that are supported by sufficient evidence. (*People v. Hughes* (2002) 27 Cal.4th 287, 327.) We independently determine, however, whether the challenged search or seizure is constitutional within the Fourth Amendment. (*Ibid.*)

Warrantless searches are per se unreasonable pursuant to the Fourth Amendment subject to a few specifically established and well-delineated exceptions. (*Arizona v. Gant, supra*, _ U.S. _ [129 S.Ct. 1710, 1716].) One exception to the warrant requirement is a search incident to a lawful arrest. (*Ibid.*) This exception derives from interests in police officer safety and evidence preservation typically implicated in arrests. (*Ibid.*)

A search incident to arrest authorizes a search of a vehicle "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." (*Arizona v. Gant, supra*, _ U.S. _ [129 S.Ct. 1710, 1719].) Circumstances unique to the vehicle context, however, justify a search incident to arrest "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." (*Id.* at p. 1714.) If there is probable cause to believe that a vehicle contains evidence of criminal activity, police officers may search any area of the vehicle in which the evidence might be found. (*Id.* at p. 1721.)

In *Gant*, the defendant was arrested for driving with a suspended driver's license. Police officers handcuffed him and locked him in a patrol car. They then searched his vehicle and found cocaine in the pocket of a jacket. (*Arizona v. Gant, supra*, _ U.S. _ [129 S.Ct. 1710, 1714].) The Supreme Court held that the search was unconstitutional as a search incident to arrest. (*Id.* at p. 1723.) "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Ibid.*) The court reasoned that the defendant could not have accessed his vehicle at the time of the search

and that officers could not reasonably expect to discover evidence of the offense of driving with a suspended license. (*Id.* at p. 1719.)

Here the trial court properly denied the motion to suppress evidence because the search and seizure complied with the Fourth Amendment. Franklin drove in an unsafe manner at night in a dangerous neighborhood. As Gaxiola approached the driver's window, he saw Franklin place an item under the driver's seat and then remove a single black glove from his hand. Franklin was nervous and perspired profusely. He refused to respond to the inquiry whether he had a gun and refused to leave the vehicle after repeated demands. Based upon his experience as a gang-enforcement police officer, Gaxiola believed Franklin hid a gun under the driver's seat. Under the circumstances, Gaxiola had probable cause to search the vehicle. (*Arizona v. Gant*, *supra*, _ U.S. _ [129 S.Ct. 1710, 1721] [police may search vehicle if there is probable cause to believe vehicle contains evidence of criminal activity].)

Franklin reads the arresting offense too narrowly. Gaxiola believed that Franklin was armed and had concealed a gun under the driver's seat. For reasons of his safety and that of his partner, he ordered Franklin to leave the vehicle. When Franklin refused despite repeated demands, Gaxiola forcibly removed him and arrested him for resisting a police officer.

Upon finding the weapon, Gaxiola saw a cellular telephone. When he opened the cover to silence it, he saw a photograph of the gun. The telephone and the photograph were in plain view. (*People v. Webster* (1991) 54 Cal.3d 411, 431 [observation and seizure of evidence in plain view from a position where officer has a right to be is not constitutionally prohibited].) Gaxiola's act of opening the cover was a minimal intrusion relating to his limited purpose of silencing the telephone. (*Ibid.* [minimal intrusion to open wallet to seek identification].)

Probable cause aside, evidence presented at the suppression hearing supports the inevitable discovery of the gun during an inventory search and impoundment. (*People v. Robles* (2000) 23 Cal.4th 789, 801, fn. 7 [the inevitable

discovery doctrine may be considered on appeal if the factual basis for the theory is set forth in the record].) Having found the gun during the vehicle search, Gaxiola did not impound the vehicle, but released it to the registered owner instead.

In view of our discussion, we need not decide whether the search was constitutionally permissible as a good-faith exception to the exclusionary rule. (*United States v. Leon* (1984) 468 U.S. 897, 906; *People v. Branner*, review granted Mar. 10, 2010, No. S179730.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Carol H. Rehm, Jr., Judge
Superior Court County of Los Angeles

Gloria C. Cohen, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief
Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,
Kenneth C. Byrne, Supervising Deputy Attorney General, Eric J. Kohm, Deputy
Attorney General, for Plaintiff and Respondent.